



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

JRE
Docket No: 3215-01
15 January 2002

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 9 January 2002. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the comments furnished by your counsel.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the rationale of the hearing panel of the Physical Evaluation Board which considered your case on 11 August 1999, a copy of which is attached. Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official

records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure

RATIONALE:

THE MEMBER IS A 28 YEAR OLD CPL, USMC(RET) WITH ABOUT 6 YEARS OF SERVICE AT THE TIME HE WAS PLACED ON THE TDRL ON 1 DECEMBER 1994 WITH A DISABILITY RATING OF 40% UNDER V.A. CODE 5293 FOR THE DIAGNOSES:

- (1) LUMBAR PAIN, CHRONIC;
CATEGORY II –
- (2) STATUS POST L5-S1 DISCECTOMY; AND
- (3) CHRONIC RIGHT L5 RADICULOPATHY AND PAIN FROM L4-5 DIFFUSE DISC BULGE.

THE MEMBER UNDERWENT TDRL EVALUATION ON 19 AUGUST 1996 AT CAMP LEJEUNE NAVAL HOSPITAL. THE PEB RECORD REVIEW PANEL CONSIDERED THE CASE ON 18 NOVEMBER 1996 AND FOUND THE MEMBER UNFIT FOR DUTY BECAUSE OF PHYSICAL DISABILITY RATABLE AT 20% UNDER V.A. CODE 5293. THE MEMBER APPEALED THIS FINDING TO A FORMAL HEARING AT THE PEB HEARING PANEL BETHESDA ON 2 APRIL 1997, AT WHICH TIME THE MEMBER WAS RETAINED ON THE TDRL AT HIS PREVIOUS RATING.

THE MEMBER UNDERWENT TDRL EVALUATION AGAIN ON 29 JULY 1998 AT CAMP LEJEUNE NAVAL HOSPITAL. THE INFORMAL PEB CONSIDERED THE CASE ON 24 MARCH 1999 AND FOUND THE MEMBER REMAINS UNFIT FOR DUTY BECAUSE OF PHYSICAL DISABILITY BASED ON THE ABOVE DIAGNOSES AND RATABLE AT 10% UNDER V.A. CODE 5295. THE MEMBER DISAGREED WITH THIS FINDING AND DEMANDED A FORMAL HEARING.

A FORMAL HEARING WAS CONDUCTED ON 11 AUGUST, 1999 AT BETHESDA, MARYLAND WITH COLONEL D. L. STOVER-KENDRICK, USMCR, AS PRESIDING OFFICER, COLONEL M. D. HALL, USMC, AND CAPTAIN L. E. MCCRACKEN, MC, USN, AS PANEL MEMBERS. THE MEMBER WAS REPRESENTED BY LIEUTENANT W. G. PERDUE, JAGC, USNR.

THE MEMBER APPEARED AT THE HEARING REQUESTING TO BE FOUND UNFIT FOR DUTY WITH A DISABILITY RATING OF 40% UNDER V.A. CODE 5295 AND PLACEMENT ON THE PDRL. TO SUPPORT HIS REQUEST THE MEMBER PRESENTED TESTIMONY AND COPIES OF HIS RECENT TREATMENT RECORDS FROM PORTSMOUTH NAVAL MEDICAL CENTER. THE MEMBER ALSO MADE HIS HEALTH RECORD, X-RAYS, AND MRI'S AVAILABLE FOR REVIEW.

AFTER CAREFUL REVIEW OF ALL THE AVAILABLE EVIDENCE AND BASED ON UNANIMOUS OPINION, THE FORMAL PEB FINDS THE MEMBER REMAINS UNFIT FOR FULL DUTY IN THE U.S. MARINE CORPS BECAUSE OF PHYSICAL DISABILITY. THE RECORD DOCUMENTS THAT THE MEMBER HAS CONTINUED TO HAVE CHRONIC BACK AND LEG PAIN SINCE UNDERGOING AN L5-S1 DISCECTOMY IN APRIL 1993 THAT LIMITS THE MEMBER'S ACTIVITIES AND WOULD INTERFERE WITH THE ADEQUATE PERFORMANCE OF REQUIRED MILITARY DUTIES.

THE TDRL EVALUATION INDICATES THE MEMBER CONTINUES TO HAVE 90% LOW BACK PAIN AND 10% RIGHT LOWER EXTREMITY PAIN. EXAM WAS REPORTED TO SHOW PAIN TO PALPATION IN THE MIDLINE OF THE LUMBOSACRAL SPINE, NEGATIVE STRAIGHT LEG RAISE AND CONTRALATERAL STRAIGHT LEG RAISE, MOTOR 5/5, INTACT AND SYMMETRIC TENDON REFLEXES, BUT DECREASED LIGHT TOUCH TO THE ANTERIOR LATERAL CALF AND MEDIAL ASPECT OF THE RIGHT FOOT. HOWEVER, THE EXAM REPORTED ON THE EVALUATION OF 15 JANUARY 1998 AT THE JOHNSTON PAIN MANAGEMENT CLINIC REPORTED NO SENSORY DEFICIT AND SUGGESTED PSYCHOLOGIC FACTORS AFFECTING PHYSICAL CONDITION WITH A POSSIBILITY OF SECONDARY GAIN FACTORS. THE LAST MRI IN MARCH 1997 REPORTED ONLY MINIMAL DISC BULGES IN THE LUMBAR SPINE BUT NO EVIDENCE OF RECURRENT HERNIATED DISC OR IMPINGEMENT ON NERVE ROOTS. HOWEVER, THERE WAS A SMALL AMOUNT OF DEGENERATIVE DISEASE AT THE L5-S1 LEVEL FACET JOINTS BILATERALLY WITHOUT COMPROMISE OF THE NEURAL EXIT FORAMEN. ALTHOUGH IT REPORTED CLUMPING OF THE NERVE ROOTS AT THE L4, 4-5, AND L5 LEVELS CONSISTENT WITH ARACHNOIDITIS, THERE IS NO SIGNIFICANT NEUROLOGIC DEFICIT ON EXAM TO CORRELATE TO THIS. BASED ON THE ABOVE, THE DISABILITY IS MOST APPROPRIATELY RATED AT 10% UNDER V.A. CODE 5295 IN ACCORDANCE WITH THE CRITERIA SPECIFIED IN ENCLOSURE (9) TO SECNAV INSTRUCTION 1850.4D.

Supposedly the Naval Physical Evaluation Board, using the same Medical findings, and the diagnostic code of 5295 came up with an inadequate rating of 10% that does not appropriately reflect the evidence and therefore we maintain is an impropriety. As the regulations have not been properly applied in connection with the medical evidence. Allowing for an inequitable decision on the FSM's behalf that we request along with [REDACTED], be corrected to show a 40% Permanent Medical Retirement (PDRL).

We ask for the Board's careful and sympathetic consideration of all the evidence of record used in rendering a fair and impartial decision. These issues do not supersede any issues previously submitted by the applicant.

Respectfully,

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National Service Officer

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